Supreme Court, U.S.
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NO. 85-766
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant

v.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE HONORABLE CHRISTOPHER J. DODD, UNITED STATES SENATOR FROM THE STATE OF CONNECTICUT, AND THE HONORABLE BRUCE A. MORRISON, UNITED STATES CONGRESSMAN FROM THE THIRD CONGRESSIONAL DISRICT, STATE OF CONNECTICUT

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Kusper v. Pontikes, 414 U.S. 51 (1973).

Lassiter v. Northampton Election Board, 360 U.S. 45 (1958).

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Smiley v. Holm, 285 U.S. 355 (1931).

Storer v. Brown, 415 U.S. 724 (1974).

United States v. Classic, 313 U.S. 299 (1941).

United States v. Gradwell, 243 U.S. 476 (1916).

Williams v. Rhodes, 393 U.S. 23 (1968).

STATEMENT OF INTEREST OF AMICI

Amici are elected Federal legislators who are members of the Democratic Party. The Honorable Christopher J. Dodd is a United States Senator from the State of Connecticut. The Honorable Bruce A. Morrison is a Member of Congress from the Third Congressional District, State of Connecticut.

Amici join this case because no other Federal legislators who are members of the Democratic Party are represented in this action. Also, as elected officials from the State of Connecticut, amici have a substantial interest in vindicating the constitutional duty of the State in regulating elections.

Appellant and appellees have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case does not turn on the constitutionality of open or closed primaries, or on the legitimacy of maintaining the two party system or preventing party "raiding". Rather, it concerns the boundaries which the First Amendment places on a state exercising its Article I duty to regulate elections. In deciding this case this Court must balance the interest of the State in fulfilling its constitutionally assigned duty against the right of a party to pursue a potential, temporary association with individuals to whom it does not extend the full privileges of membership.

In exercising its duty under Article I of the Constitution, a State may, in a non-discriminatory fashion, regulate the relationship between a party and non-members. While this Court has held that a

significant intrusion into the internal workings of a political organization requires a compelling state interest, the statute at issue in this case does not in any way regulate the relationship of the members of the party inter se.

The courts below failed to distinguish between an intrusion into the internal workings of a party and an exercise of state responsibility under Article I of the Constitution which affects the relationship between a political party and individuals who have chosen not to become members of the party. By mistakenly analyzing that case as involving an intrusion into the internal affairs of a political organization, the Court of Appeals incorrectly required Connecticut to demonstrate a compelling interest for its challenged statute when its rational and legitimate interests are

sufficient to sustain the statute's validity.

ARGUMENT

I. CONNECTICUT HAS A CONSTITUTIONAL DUTY TO REGULATE ELECTIONS.

A state has a substantial interest in carrying out its constitutionally assigned duty to regulate elections. While this duty must be balanced against the limitations imposed by other constitutional provisions, it derives directly from the text of the Constitution and must be accorded great weight.

Article I of the Constitution explicitly creates this duty to regulate elections.

> The policy of . . . entrusting the conduct of elections to state laws, administered by state officers, which has prevailed from the foundation of the Government to our day, . . . was proposed by the makers of the Constitution and was entered upon advisedly by the people who adopted it . . . .

United States v. Gradwell, 243 U.S. 476, 484 (1916).

Article I, Sec. 4 assigns states the responsibility to regulate each aspect of the electoral process.[1]

> The subject matter [of Art. I, Sec. 4] is the "times, places, and manner of holding elections for Senators and Representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience show are necessary in order to enforce the fundamental right involved.

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[1] Article I, Sec. 4 provides:

> The Times, Places, and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of choosing Senators.

Smiley v. Holm, 285 U.S. 355, 366 (1931).

"That the states may specify the qualifications for voters is implicit in Article I, Sec. 2 . . . ," Baker v. Carr, 369 U.S. 186, 243 (1961), so that in determining standards required of voters, a state has "wide scope for exercise of its jurisdiction," Lassiter v. Northampton Election Board, 360 U.S. 45, 51 (1958).[2]

This Court has held that when a state has chosen to include in its electoral mechanisms primaries as a means of access to the general electoral ballot, the state's interest applies equally to the

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[2] Article I, of Sec. 2, Clause 1, provides,

> The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the Electors, in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

primary and to the general election. United States v. Classic, 313 U.S. 299 (1941). See, also, Smith v. Allwright, 321 U.S. 649 (1944), and Buckley v. Valeo, 424 U.S. 1 (1975).

Although the Constitution grants the states "broad powers," Roudebush v. Hartke, 405 U.S. 15, 25 (1971), to regulate both primary and general elections, these powers must be exercised within the bounds of the Constitution itself, for while it is

> . . . the established rule of law that the franchise is essentially a matter of state concern, Minor v. Happersett, 21 Wall. 162; Lassiter v. Northampton Election Board, 360 U.S. 45, [it is] subject to the overriding requirements of various federal constitutional provisions dealing with franchise, e.g., the Fifteenth, Seventeenth, Nineteenth, and Twenty-fourth Amendments, and, as more recently decided, to the general principles of the Fourteenth Amendment. Reynolds v. Simms, 377 U. S. 533; Carrington v. Rash, 380 U.S. 89.

Katzenback v. Morgan, 384 U.S. 641 (1965). Like other constitutional provisions, the First Amendment places a limitation on the state's duty to regulate elections.

II. THE ASSOCIATION SOUGHT BY THE REPUBLICAN PARTY IS A HIGHLY ATTENUATED RELATIONSHIP WHICH THE CONSTITUTION PERMITS TO BE AFFECTED BY THE STATE PURSUANT TO ITS CONSTITUTIONAL DUTY TO REGULATE ELECTIONS.

The validity of the Conn. Gen. Stat. Sec. 9-431 requirement of party registration for primary voters turns on the standard of review applied. There can be no doubt that the duties assigned Connecticut by Art. I, Sec. 4, represent a sufficient state interest to justify the minimal enrollment requirement involved, if measured against a "legitimate state interest test." Only because the courts below held the Connecticut requirement to the extraordinarily stringent "compelling interest" standard was the statute found wanting.

This Court's decisions construing associational rights under the First Amendment do not support the standard of review chosen by the courts below. They

have treated the Connecticut statute as intruding into the internal affairs of the Republican Party when it in fact does no more than regulate the Party's interaction with non-members for the purpose of primary voting.

The distinction in the cases decided by this Court is quite clear, though not necessarily explicit. On the one hand, this Court has held that intrusions into the internal workings of a party require a compelling interest.

> [T]he government may try to interfere with the internal organization or affairs of the group, e.g., Cousins v. Wigoda, 419 U.S. 477, 487-488. . . . Infringements on that right may be justified by regulations adopted to serve compelling state interests . . . .

Roberts v. United States Jaycees, 82 L. Ed. 2d 462, 474-475 (1984). And, the Court has repeatedly used a compelling interest test when the State has

substantially intruded into the workings of a political party by attempting to regulate how the party will conduct its internal affairs.

> The issue is whether the State may compel the National party to seat a delegation chosen in a way that violates the rules of the Party. And this issue was resolved, we believe, in Cousins v. Wigoda, 419 U.S. 477. . . . [A] State . . . may not constitutionally substitute its own judgement for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.

Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 121, 124-125 (1981).

In discussing a group's right of association, however, this Court has always been extremely careful, in its language, to limit its holding to the group and its members. This Court has explained that "compelled disclosure of petitioners Alabama membership is likely

to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs . . . ," N.A.A.C.P. v. Alabama, 357 U.S. 449, 462-463 (1958) (emphasis added); "compulsory disclosure of the membership lists . . . would work a significant interference with the freedom of association of their members," Bates v. Little Rock, 361 U.S. 516, 523 (1960) (emphasis added). In other contexts, it has stated "that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys . . . to assist its members . . . " Mine Workers v. Illinois Bar Ass'n., 389 U.S. 217, 221-222 (1967) (emphasis added); and that "Minnesota's compelling interest . . . justifies the impact that application of the statute . . . may have on the male

members' associational freedoms," Roberts v. United States Jaycees, 82 L. Ed. 2d 462, 475, (emphasis added).

Membership has also been central in the ballot access and convention delegate cases. "The state . . . has made it virtually impossible for a new political party, even though it has hundreds of thousands of members . . . to be placed on the state ballot . . . ." Williams v. Rhodes, 393 U.S. 23, 24 (1968) (emphasis added). "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association," Cousins v. Wigoda, 419 U.S. 477, 487 (1975) (emphasis added); "the interests advanced by the State do not justify its substantial intrusion into the associational freedom of members of the National Party," Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 126

(1981) (emphasis added).

In each of the above-cited cases, the state was attempting, in some way, to regulate the relationship between the group and individuals who had declared themselves members of the group. The state was attempting to intrude into the internal workings of the group.

On the other hand, a lesser standard of review has been applied regarding the association of a political party with potential members. This Court's decisions, Kusper v. Pontikes, 414 U.S. 51 (1973), Rosario v. Rockefeller, 410 U.S. 752 (1972), and Nader v. Schaffer, 429 U.S. 989 (1976) aff'g without opinion 417 F.Supp. 837 (D.Conn.), should control the outcome in this case. In these cases, this Court has clearly and unambiguously set out the First Amendment limits on a state exercising its Article I responsibility of regulating elections.

The Court of Appeals below misapplied Kusper, Rosario, and Nader in three ways. First, it ignored the standard of review in these cases most closely analogous to the case presented. It failed to recognize the crucial distinction between the inapposite intrusion cases and these "right-on-point" enrollment or membership requirement cases.

In Rosario v. Rockefeller, 410 U.S. 752 (1972), the state imposition of a time limit for enrollment in a party was considered. While this time limit burdened the associational rights of the individuals seeking to vote in that case, the statute was upheld because it served a "legitimate purpose and [was] in no sense invidious or arbitrary." 410 U.S. at 762. This standard was applied despite a dissenting argument in favor of stricter scrutiny. 410 U.S. at 768 (Powell,J.,

dissenting). But even the dissent acknowledged the validity of a shorter time limit of 30 to 60 days, id., at 771, and absolutely no doubt exists that the requirement of enrollment as a condition of primary voting was deemed valid.

The Court in Rosario took care to point out that despite the eight to eleven month delay, voters were not precluded from voting since, had they chosen to enroll in a party, they could have participated in a primary.

> We do not uphold the statute on the ground that it is merely a prohibition on voting in one particular primary, rather than a permanent ban on voting. That is neither our point nor the effect of the law. The point is that the statute did not prohibit the petitioners from voting in any election, including the 1972 primary, had they chosen to meet the deadline established by the law.

The Court reasoned that, by virtue of this element of choice, the time limitation imposed by the New York scheme was

constitutionally acceptable. "New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment. . . . " Rosario v. Rockefeller, 410 U.S. 752, 762.

In Kusper v. Pontikes, 414 U.S. 51 (1973), this Court explored the limits on the Rosario decision and held that

> By preventing the appellee from participating at all in Democratic Primary Elections during the statutory period, the Illinois statute deprived her of any voice in choosing the parties candidates, and thus substantially abridged her ability to associate effectively with the party of her choice.

414 U.S. 51, 58. At issue in Kusper was a state rule which prohibited a person from voting in the primary election of a political party if he had voted in the primary of any other party within the

preceding 23 months. The Court in Kusper was careful to explain how the rule at issue in that case differed from the Rosario rule. "[W]hile the Court held in Rosario that the New York delayed enrollment scheme did not prevent voters from exercising their constitutional freedom to associate with the political party of their choice, the Illinois 23-month rule does just that." Kusper v. Pontikes, 414 U.S. 51, 61.

The present case falls well within the bounds set out by the Kusper-Rosario rule. The State statute in this case does not prevent voters from associating with the Republican Party. It merely sets out a legitimate time limitation on party enrollment -- a time limitation which was substantially less than the burden found acceptable in Rosario.[3]

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[3] The contrast between the participating

rights of party members and the role provided to unaffiliated voters by the Republican Party rule is very substantial. Party members obtain by enrollment, Conn. Gen. Stat. Sec. 9-57, a wide variety of opportunities to associate with the party, including participation in party conventions, Sec. 9-383 - 9-386; participation on town committees, Sec. 9-392 - 9-393; participation in state legislature conventions, Sec. 9-394 - 9-394a; voting at municipal caucuses, Sec. 9-396a - 9-397; voting in primaries for town committee members, convention delegates, and all state and municipal offices, beyond just the statewide ticket and Congress, Sec. 9-415 - 9-431; and participation as a candidate for municipal, state and federal offices, see generally, Sec. 9-381 - 9-450. The opportunity to participate in state ticket and federal legislative primaries is a much more attenuated opportunity to associate, especially because such primaries cannot even occur unless convention delegates (from whose selection unaffiliates are barred) give sufficient support (at least twenty percent of a roll call vote) at a convention or, for municipal offices, a petition (which unaffiliates cannot sign) of a sufficient number of party members is filed. This is hardly the crusade of openness by which the Republican Party rule was characterized below.

Second, the Court of Appeals mistakenly made much of the fact that Nader and Rosario involved challenges by potential voters rather than by political parties. But this distinction is of no constitutional significance. Association is a bilateral interaction. While one party or the other can initiate an association, it cannot exist without consent of both parties. And an association does not exist until that consent has been given. To say, as the Court of Appeals does, that the Republican Party has a greater interest in seeking an association with an unaffiliated voter than that voter has in association with the Republican Party has no basis in logic or law. Once this is recognized, it becomes clear that Rosario and Nader govern the result in this case.

Third, the Court of Appeals improperly analogized the limitation which

Sec. 9-431 places on the Republican Party to the locking in of the petitioner in Kusper. See, 770 F. 265, 281 n. 24. But on examination, this analogy is found wanting. It is not Sec. 9-431 which limits the Republican Party's ability to associate with unaffiliated voters. With or without the challenged statute, the Party must persuade these voters to associate with it. Until then, any associational interest is inchoate.

Contract rules of offer and acceptance provide a helpful way of thinking about the present case. The Republican Party on its own cannot associate with unaffiliated voters. The most the Party can do is to make a unilateral offer to unaffiliated voters to associate with the Party. Kusper and Rosario establish the limits of state intrusion into that offer and acceptance.

The difference between the two cases in this regard is that in Kusper, the state statute absolutely prevented association and voting no matter what the individual did between elections, while in Rosario the individual could have associated with the party and voted had he chosen to register. The Court in Rosario upheld the state statute requiring the individual to take action, even though that action needed to be taken eight months before the election. The crucial distinction is that in Rosario, the unaffiliated voter was not prevented from voting, even though the state had placed a burden on him to act.

As noted above, the fact that the party is challenging this burden, rather than the individual is not significant. And the fact that a potential primary voter must join the Republican Party the day before a primary election rather than show up to vote one day later hardly

leaves the party powerless to attract these voters to its cause. It must merely act one day earlier and establish the association by extending the rights of membership. It is the failure to accord membership which is the true conflict between the Republican Party rule and Sec. 9-431. But in the absence of a membership relationship, the Party's associational interests are attenuated and cannot overcome the state's ultimate choice to require enrollment under its Article I responsibility to regulate elections.

This Court removed any doubt about the meaning of Kusper and Rosario when it summarily affirmed Nader v. Schaffer, 429 U.S. 989 (1976), aff'd without opinion, 417 F.Supp. 837 (D. Conn.). In Nader, the District Court used a legitimate state interest standard to uphold the very same

law at issue in this case. Relying on Rosario, the District Court reasoned that the enrollment requirement of the Connecticut statute was a minimal burden on petitioner's First Amendment rights. 417 F.Supp. 837, 848. Since the same statute is at issue in the present case, the burden on petitioner's First Amendment rights must be "minimal". As a consequence, the minimal burden placed on petitioner's First Amendment rights is outweighed by the state's interest in fulfilling its constitutional mandate to regulate elections.

III. ARTICLE I, SEC. 2 FORBIDS A STATE OR PARTY FROM APPLYING DIFFERENT ELECTORAL ELIGIBILITY STANDARDS FOR STATE AND FEDERAL LEGISLATORS.

Article I, Sec. 2 of the Constitution provides that:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

This Court has stated in unambiguous language how Art. I, Sec. 2 is to be read:

> The states in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

Ex Parte Yarbrough, 110 U.S. 651, 663 (1883). More recently the Court has stated,

> Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators.

Katzenbach v. Morgan, 384 U.S. 641, 647 (1965).

In Oregon v. Mitchell, 400 U.S. 112, 125 (1970), Justice Black, delivering the judgment of the Court and expressing his own view of the case, stated that

> Art. I, Sec. 2 is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Article I, Sec. 4.

In United States v. Classic, 313 U.S.

299, 318 (1941), this Court held that Secs. 2 and 4 of Article I apply to primaries, as well as to general elections.

> Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, Sec. 2. And this right of participation is protected just as is the right to vote at the election, where primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes, or never determines the ultimate choice of the representative. [Emphasis added].

Again in Buckley v. Valeo, 424 U.S. 1, 14 n. 16 (1975), the Court restated Classic's holding.

> Although the Court at one time indicated that party primary contests were not "elections" within the meaning of Article I, Sec. 4, Newberry v. United States, 256 U.S. 232 (1921), it

later held that primary elections were within the Constitution's grant of authority to Congress. United States v. Classic, 313 U.S. 299 (1941). Id. at 14, Note 16.

Since the primaries fall under the Article I definition of elections,[4] the Republican Party rule, which permits different electors to vote in congressional elections than those who

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[4] The Court of Appeals concluded that Classic was not controlling. While claiming that the question was one of first impression, the Court divided Sec. 2 into two clauses, the first of which, it reasoned, "chosen . . . by the people", concerned a substantive right to vote, while the second clause was intended as a "procedural safeguard." The question is not one of first impression. The language of Classic is clear. Secs. 2 and 4 of Article I refer both to general elections and to primaries. To split Sec. 2 apart, as the Court of Appeals did, in order to argue that "by the people" refers to party primaries, but that the phrase "and the electors", four words away, does not, does violence both to the text of Sec. 2, as well as to the language of Classic and its progeny. Indeed, amici has been able to find nothing in the history of the Constitution, or in any case, to support this interpretation.

vote for the most numerous branch of the state legislature, violates the Constitution.

Respectfully submitted,

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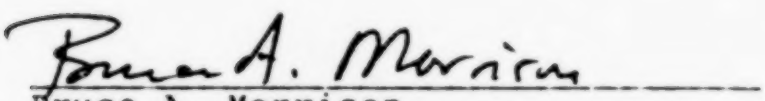

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CERTIFICATION

I hereby certify that a copy of the foregoing Amicus Curiae Brief has been sent by mail, postage prepaid, to: Stanley A. Twardy, Jr., Silver, Golub, and Sandak, 184 Atlantic Street, Stamford, CT 06904; Ralph G. Elliot, Tyler, Cooper and Alcorn, City Place, Hartford, CT 06103-3488; Elliot F. Gerson, Deputy Attorney General, 30 Trinity Street, Hartford, CT 06106; and Daniel R. Schaefer, Assistant Attorney General, P.O. Box 120, Hartford, CT 06101, this 27th day of February, 1986.